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No. 92-960

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

THOMAS D. McAUSLAND
and CHRISTOPHER PAFORT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a private citizen who obtains unclassified government information may be convicted of theft of government property (18 U.S.C. § 641) or wire fraud (18 U.S.C. § 1343) where disclosure of the information, although not prohibited by statute or published regulation, violates internal government rules, custom, or practice.

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a pro-free enterprise public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the rights of individuals and corporations to conduct their business affairs unfettered by unwarranted governmental interference. WLF believes that the best interests of the American free-enterprise system are advanced when government keeps to an absolute minimum its interference

with the free flow of commercial and noncommercial information; accordingly, WLF has appeared before this Court as well as other state and federal courts in support of broad commercial speech rights. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, No. 91-1200, *cert. granted*, 112 S. Ct. 1290 (1992); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 110 S.Ct. 2281 (1990).

At the same time, WLF recognizes that the public interest at times demands that the government restrict the free flow of information and that the government may impose criminal penalties on those who violate clearly spelled-out prohibitions against the release of information. For example, WLF filed a brief in *United States v. Morison,* 844 F.2d 1057 (4th Cir.), *cert. denied,* 488 U.S. 908 (1988), seeking affirmance of the criminal sanctions imposed in that case. However, WLF believes strongly that no one should face criminal sanctions for divulging or receiving commercial information in the absence of an explicit government prohibition against such activity. Accordingly, WLF filed a brief in support of Petitioners in the court below and does so again in support of the Petition for Writ of Certiorari.

WLF believes that its experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this Petition. WLF submits this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, WLF hereby adopts by reference the Statement contained in the Petition for Writ of Certiorari.

In brief, Petitioners Thomas McAusland and Christopher Pafort stand convicted of receiving from the federal government unclassified information that could

have been helpful to their employer, Litton Data Systems, Inc. ("Litton"), in obtaining certain defense contracts. At the time of the actions in question (1987-88), no federal law or regulation explicitly forbade conveying or receiving the information obtained by Petitioners. Moreover, they did not use any illicit means to obtain the information, *e.g.*, stealing documents from locked files or bribing government officials.

Nonetheless, Petitioners' attempts to obtain this information led to their conviction under criminal statutes that prohibit theft of government property (18 U.S.C. § 641), wire fraud (18 U.S.C. § 1343), and conspiracy (18 U.S.C. § 371). None of those three statutes explicitly addresses efforts to obtain government information. Section 641 makes it a criminal act knowingly to convert "without authority" any "thing of value of the United States." Section 1343 prohibits use of interstate wire communications as part of a scheme to defraud. Section 371 prohibits conspiracies to violate federal law. In sum, the legitimacy of Petitioners' convictions boils down to whether a law that forbids converting government property "without authority" may properly be applied to the transfer of unclassified government information, even when no regulation or other federal law explicitly prohibits such transfers.

REASONS FOR GRANTING THE PETITION

This case raises an issue of exceptional importance -- the circumstances under which the government may impose criminal liability on a private citizen for the receipt of government information. The courts of appeals are split regarding whether government information can *ever* qualify as "a thing of value of the United States" whose improper receipt is prohibited under § 641. The Ninth Circuit has long held that "section 641 should not be read to apply to intangible goods" such as government information. *United States v. Tobias*, 836 F.2d 449, 451 (9th Cir.), *cert. denied*, 485 U.S. 991 (1988); *Chappell v. United States*, 270 F.2d 274, 276 (9th Cir. 1959). The Fourth Circuit is

one of three courts of appeals that have reached the opposite conclusion -- that government information *does* fall within the purview of § 641. *United States v. Fowler*, 932 F.2d 306, 309-310 (4th Cir. 1991).[1]

Regardless how one comes out on the issue, the continued existence of the circuit split places an intolerable burden on First Amendment rights. The right to convey and receive government information (actions that undoubtedly qualify for some degree of First Amendment protection) now depends on the fortuity of where within the United States one happens to live. This Court has rightly condemned such state-to-state disparities in First Amendment protection.[2] Accordingly, the Court should grant certiorari to resolve the inter-circuit conflict.

However, WLF's desire to encourage the Court to resolve that conflict was not the motivating factor in WLF's decision to file this brief. Rather, WLF is filing primarily because this prosecution expands statutes governing receipt of government property far beyond anything contemplated by Congress in adopting the statutes and far beyond what individuals reading the statutes could have anticipated. WLF encourages the Court to hear this case in order to reaffirm the principle that no one should be held criminally accountable for his conduct unless he has first been given clear notice that the conduct is prohibited; that principle applies particularly strongly

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[1] *See also United States v. Jeter*, 775 F.2d 670, 680 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986); *United States v. Girard*, 601 F.2d 69, 70-71 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979).

[2] *See, e.g., Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 110 S. Ct. 2281, 2291 n.16 (1990) (criticizing suggestion that the Court should allow Illinois to prohibit attorneys from listing professional certifications on their letterhead, while simultaneously deferring to rulings of Alabama and Minnesota supreme courts that First Amendment bars such prohibitions, because it "would create radical disparities in First Amendment protections from State to State").

when, as here, the prosecution implicates First Amendment values.

Prior cases construing § 641 have uniformly held that transfers of unclassified government information are not deemed to be "without authority" -- and thus in violation of § 641 -- unless a formal regulation or some other federal law explicitly prohibits such transfers. In this case, no formal regulation or federal law (other than § 641) explicitly prohibited Petitioners from receiving the procurement information at issue here. Accordingly, the Court should grant the writ of certiorari to make clear that the interpretation of § 641 espoused by the government in this case and adopted by the Fourth Circuit impermissibly broadens that statute.

A § 641 conviction is particularly inappropriate in this case, where Petitioners stand convicted of conduct that enjoys considerable First Amendment commercial speech protection. While Congress may constitutionally prohibit the receipt of procurement-sensitive government information (and it did so when it adopted the Procurement Integrity Act), this Court should not lightly assume that Congress would criminalize the receipt of such information *sub silentio* as part of a law (§ 641) directed against the theft of government property in general, particularly in view of the substantial First Amendment protection traditionally afforded to such commercial speech activity.

Were the Court to construe § 641 as urged by the government, then the statute would be unconstitutionally vague as applied to Petitioners. A criminal law is void for vagueness if it either: (1) fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) impermissibly delegates to law enforcement officials and juries decisions regarding how the law is to be enforced. The interpretation of § 641 being urged by the government fails on both scores. Rather than construing § 641 in a manner that will render the law unconstitutionally vague as applied to Petitioners,

the Court should grant certiorari and construe § 641 so as to leave Petitioners' conduct outside the scope of that law.

I. SECTION 641's "WITHOUT AUTHORITY" LANGUAGE HAS NEVER BEEN INTERPRETED AS PROHIBITING ALL DISCLOSURES OF GOVERNMENT INFORMATION EXCEPT FOR THOSE WITH EXPLICIT AUTHORIZATION

A. Disclosure Is Not "Without Authority" Unless It Violates a Federal Regulation or Law (Other Than § 641) That Explicitly Prohibits Disclosure

Although Section 641 has been a part of the federal criminal code for some time,[3] only in recent years has the government attempted to apply the statute to the taking of intangible government property, such as information. As noted above, the Fourth Circuit in this case (and previously in *Fowler*) joined two other courts of appeals in holding that § 641 may properly be so applied.

Nonetheless, prior to this case no court had ever construed § 641's "without authority" language as prohibiting all disclosures of government information except in those instances in which disclosure has been explicitly authorized. Such a construction is unsupported by the statute's legislative history and presents clear First Amendment problems by purporting to criminalize speech disclosing information of public interest that the government has no reason to keep secret. Thus, for example, in *United States v. Lambert*, 446 F. Supp. 890 (D. Conn. 1978), *aff'd sub nom, United States v. Girard*, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979),

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[3] Section 641 first appeared in its current form in 1948 as a recodification of several earlier criminal statutes. "[I]t was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Morissette v. United States*, 342 U.S. 246, 268 n.28 (1952).

the court required the government in a § 641 prosecution to demonstrate that disclosure of the information at issue was "affirmatively prohibited by other federal statutes, administrative rules and regulations, or, perhaps, longstanding government practices." *Id.* at 899.

Contrary to the government's contention before the court of appeals, nothing in subsequent court of appeals decisions (prior to this case) undercuts the limiting construction given to § 641 by *Lambert*. While the Second Circuit, in affirming *Lambert*, declined to consider the defendants' vagueness and overbreadth challenges, it termed the district court's opinion -- including the district court's construction of § 641 -- "well-reasoned." *United States v. Girard*, 601 F.2d 69, 70 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979). The case upon which the government principally relied, *United States v. Jeter*, 775 F.2d 670, 682 (6th Cir. 1985), stated that it was "follow[ing] the lead of *Girard*" in declining to consider the defendant's vagueness and overbreadth challenges, but nowhere did the opinion suggest that either *Lambert*'s or *Girard*'s construction of § 641 was inaccurate.[4] Moreover, the Fourth Circuit's decision in *United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988), while not explicitly relying on *Lambert*'s limiting construction of § 641, upheld the defendant's conviction in the face of an as-applied vagueness challenge to § 641 solely because national security regulations known to the defendant -- which explicitly prohibited disclosure of the documents at issue in that case -- eliminated any doubt regarding whether the defendant's release of documents was "without authority."

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[4] *Jeter* merely held -- in accord with *Lambert* and *Girard* -- that § 641 extends to unauthorized conversion of *intangible* property, including government information. *Jeter*, 775 F.2d at 682. *Jeter* had no cause to consider when a conversion can be said to be "without authority" within the meaning of § 641. *Fowler* explicitly followed both *Girard* and *Jeter* in holding that § 641 extends to unauthorized conversion of intangible property, but -- like *Jeter* -- did not consider the scope of § 641's "without authority" language.

Under *Lambert*'s construction of § 641, Appellants' conviction cannot stand, and thus the Fourth Circuit's decision is squarely in conflict with *Lambert*. Construing the evidence at trial in the light most favorable to the government, McAusland and Pafort received the following information in 1987-88 regarding defense procurement projects: (1) advance word that Litton's proposal for the Advanced Tactical Air Command Central ("ATACC"), a procurement for a radar command and control system, was unacceptable; (2) the government's source selection plan and price evaluations for UYQ-21, a procurement for a second supplier of a radar display system; and (3) the government's acquisition plan for FOCS, a procurement to obtain a source for a Marine Corp fiber optic communications system. No then-existing federal law or Federal Acquisition Regulation ("FAR") prohibited the release of that information.

To the contrary, then-existing FARs made all procurement information presumptively releasable. *See* 48 C.F.R. § 5.401(b)(1) (1987) (contracting officers are authorized to "make available maximum information to the public, except information . . . [o]n plans that would provide undue or discriminatory advantage to private or personal interests"); 48 C.F.R. § 15.413-1(b) (1987) ("general information that is not prejudicial to others may be furnished upon request"). Indeed, 1987 FARs *required* that Litton be informed immediately that its ATACC proposal had been deemed unacceptable. *See* 48 C.F.R. § 15.1001(a) (1987) ("the contracting officer, upon determination that a proposal is unacceptable, *shall* promptly notify the offeror") (emphasis added).

In response to alleged abuses in the government contracting system, Congress adopted the Federal Procurement Policy Act Amendments of 1988 (the "Procurement Integrity Act"), which explicitly forbids any representative of a government contractor from attempting to obtain from government officials prior to the award of a contract any "proprietary" or "source selection

information" regarding a procurement. 41 U.S.C. § 423(a). The Procurement Integrity Act for the first time provides precise definitions for the terms "proprietary information" and "source selection information"; those definitions make clear that Petitioners are now forbidden to seek the types of information they obtained in 1987-88, prior to adoption of the Act. That Congress's stated purpose in adopting the Act was to fill a void in existing procurement laws (*see* H.R. Rep. No. 911, 100th Cong., 2d Sess. 19-20 (1988)) only strengthens the argument that § 641 was never intended to criminalize the receipt of unclassified procurement information.

Lambert opined that "perhaps" one could be prosecuted under § 641 for the receipt of government information if such receipt were prohibited by "longstanding government practices." *Lambert*, 446 F. Supp. at 899. However, this Court need not consider here whether such a prosecution would meet requisite due process standards because the permissive 1987-88 FARs -- which encouraged the free flow of information to contractors -- defeat any claim the government could make of an unambiguous "longstanding" practice forbidding receipt of the types of information received by Petitioners. The existence of FARs making clear that contracting officers had wide discretion to release procurement information meant that government contractors could reasonably believe that any information they received had been properly released.

In sum, § 641 case law prior to the decision below made clear that no § 641 conviction could be sustained in the absence of any law or publicly disclosed regulation explicitly prohibiting receipt of the types of information obtained by Petitioners. The Court should grant certiorari in order to resolve the conflict between the Fourth Circuit's interpretation of § 641 and prior court decisions.

B. Protection of Commercial Speech Rights Requires That § 641 Be Found Inapplicable to the Facts of This Case

A common denominator of virtually every prior decision upholding a § 641 prosecution for receipt/disclosure of government information is the negligible value to society of such receipt/disclosure. *Lambert/Girard* involved an agent and a former agent of the Drug Enforcement Administration who conspired to sell the names of DEA informants to marijuana smugglers, to assist them in their smuggling activities. *Girard*, 601 F.2d at 70. *Jeter* involved a man who sold secret grand jury transcripts to the grand jury's targets, to assist the targets in defending prosecutions for drug dealing. The Fourth Court's decision in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982), involved a man who obtained classified U.S. government documents dealing with U.S. Southeast Asia policy and passed them on to representatives of the communist Vietnamese government during the course of the 1977 Paris negotiations between Vietnam and the U.S. As the Sixth Circuit noted in *Jeter*, receipt/disclosure of government information in such circumstances -- involving conduct traditionally understood to be criminal -- has rarely been deemed worthy of First Amendment protection. *Jeter*, 775 F.2d at 678 (the defendant's "conduct would seem to constitute merely another type of ordinary criminal communication in a conspiracy that has been traditionally found undeserving of any First Amendment protection").

In marked contrast to those earlier § 641 prosecutions, this case involves the prosecution of two individuals who were seeking information in pursuit of a laudable commercial goal. Our nation's free-enterprise system owes its success to individuals such as Thomas McAusland and Christopher Pafort who have worked diligently to obtain the information necessary to permit their commercial enterprises to compete efficiently in a free market. There simply is no basis for equating Petitioners' conduct with

the conduct of marijuana smugglers, drug dealers who are grand jury targets, or spies for communist governments.

The federal government is within its rights in declaring explicitly -- as it did in adopting the Procurement Integrity Act -- that certain unclassified information relating to government procurements should never be released to procurement bidders. But we should not lightly assume that Congress would criminalize the receipt of such information *sub silentio* as part of a law directed against the theft of government property, particularly in view of the substantial First Amendment protection traditionally afforded to such commercial speech activity.

While the Court has held that commercial speech activity of the type engaged in by Petitioners is entitled to a somewhat lesser degree of protection than is political speech, the Court nonetheless has been vigilant in protecting commercial speech from unwarranted abridgment. As the Court said in upholding the right of consumers to receive commercial messages regarding pharmaceutical pricing:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, *the free flow of commercial information is indispensable*.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (emphasis added).[5]

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[5] *Virginia State Board of Pharmacy* makes clear that it is irrelevant for purposes of First Amendment analysis whether Petitioners were the purveyors or recipients of information. *Id.* at 756 ("where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both").

Throughout this case, the government has implied that Petitioners' behavior was base and somewhat sinister because they were seeking information for the sole purpose of maximizing the profits of their employer. To the contrary, in seeking to obtain information needed to permit their employers to maximize profits, Petitioners were acting in the best traditions of the American free-enterprise system. Indeed, the Court recently rejected the notion that a profit motive lessens the constitutional protection otherwise afforded to speech, stating, "Some of our most valued forms of fully protected speech are uttered for a profit." *Board of Trustees of the State University of New York v. Fox,* 109 S. Ct. 3028, 3036 (1989). The Court has, for example, afforded full First Amendment protection to the contents of a paid advertisement soliciting money. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

In light of the substantial First Amendment rights at issue in this case, the Court should grant certiorari in order to prevent § 641's expansion to reach conduct that has never before been the subject of a criminal prosecution. WLF respectfully suggests that the Court not impute to Congress an intent to reverse the normal presumption favoring the free flow of commercial information, absent a clear statement from Congress to that effect. Congress provided the necessary clear statement in adopting the Procurement Integrity Act, but nothing in the language or history of § 641 clearly indicates that Congress intended to criminalize the receipt of unclassified information whose dissemination is not otherwise prohibited by some other federal law or regulation.

II. THE APPLICATION OF § 641 (AS CONSTRUED BY THE FOURTH CIRCUIT) TO PETITIONERS VIOLATES THEIR DUE PROCESS RIGHTS

Lambert/Girard arrived at their limiting construction of § 641 in large measure in order to avoid the

constitutional vagueness problems that would have arisen had the statute been given a broader reading. *Lambert*, 446 F. Supp. at 899. That mode of statutory construction is entirely proper; it is a cardinal rule of statutory construction that where, as here, an otherwise acceptable construction of a statute would raise serious constitutional problems, a court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 108 S. Ct. 1392, 1397 (1988).

By declining in this case to employ the limiting construction of § 641 adopted in *Lambert/Girard,* the Fourth Circuit has rendered § 641 unconstitutionally vague as applied to Petitioners. Accordingly, the Court should grant certiorari and reverse Petitioners' convictions under either interpretation of § 641. A brief discussion of the void-for-vagueness doctrine should suffice to make clear why § 641 may not constitutionally be applied to Petitioners' conduct.

Chief among the protections afforded by the Due Process Clauses of the Fifth and Fourteenth Amendments is the right not to be deprived of life, liberty, or property on the basis of an overly vague law. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). As the Court explained in *Grayned*:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and

> juries on an *ad hoc* basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09. The prosecution of Petitioners under § 641 violates both of the important values cited by *Grayned* as underlying the void-for-vagueness doctrine.

First, § 641 cannot be said to have given Petitioners fair notice of what conduct is prohibited. The statute merely states that it is a crime to convert government property "without authority," but provides no definition of that term. As noted above, the First Amendment precludes construing the statute as prohibiting all conveyance and receipt of government information in the absence of express authorization to do so, but no other construction is readily suggested by the wording of § 641. At the very least, it was reasonable for Petitioners to have concluded that they were free under § 641 to obtain the procurement information at issue in this case, in light of the absence of formal regulations and/or other federal law prohibiting them from doing so and in light of the FARs' grant to contracting officers of discretion to release the information, regardless whether internal, nonpublic government rules were to the contrary.[6] Accordingly, prosecuting Petitioners under a statute that could reasonably be interpreted as permitting the conduct they engaged in violates their due process rights by failing to warn them adequately regarding the consequences of their conduct.

Second, permitting prosecutions under § 641 under these circumstances creates a grave danger of arbitrary and

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[6] That conclusion was particularly reasonable in light of the existence of the *Lambert* decision in 1987-88, the years at issue in this prosecution.

discriminatory law enforcement.[7] If, as the government suggests in this case, informal government rules against disclosure are sufficient to criminalize release of government information, then any government supervisor who tells his subordinates not to disclose unclassified but embarrassing information could initiate criminal proceedings against a subordinate who goes ahead with disclosure. *Lambert*'s limiting construction of § 641 was based in part on the court's expressed desire to avoid the discriminatory enforcement dangers inherent in delegating to government supervisors the authority to determine on their own when dissemination of information is "without authority" and thus criminal. *Lambert,* 446 F. Supp. at 899.

Indeed, the prosecution of McAusland and Pafort has all the earmarks of arbitrary law enforcement that the void-for-vagueness doctrine was intended to prevent. Their prosecution coincides with the loud public outcry against procurement abuses that arose in connection with announcement of the Ill Wind investigation. That no one has ever previously been convicted under § 641 for receipt of information whose dissemination was not prohibited under any regulation or other federal law strongly suggests that the decision to prosecute was based on arbitrary political considerations rather than on the merits of their case. The temptation for prosecutors to construe § 641 for the first time as covering the release of documents whose release had just been criminalized under the Procurement Integrity Act was, no doubt, extremely strong. The void-for-vagueness doctrine is intended to prevent arbitrary criminal prosecutions of this sort.

That the conduct at issue in this case consisted of commercial activity in no way lessens Petitioners' right to

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[7] The Supreme Court has recognized that the danger of such arbitrary and discriminatory enforcement is the more important of the two aspects of the void-for-vagueness doctrine. *Kolender v. Lawson,* 461 U.S. 352, 357-58 (1983); *Smith v. Goguen,* 415 U.S. 566, 575 (1974).

protection under the void-for-vagueness doctrine. While the Supreme Court has recognized that economic regulation is subject to a less strict vagueness test, that relaxation of the vagueness test does not apply when the government is attempting to impose criminal penalties on alleged violators of the economic regulation in question. *Kolender*, 461 U.S. at 358 n.8.

In sum, the void-for-vagueness doctrine dictates that if § 641 is properly construed as prohibiting Petitioners' conduct, then it is unconstitutionally vague as applied to them. The Court should grant certiorari in order to prevent Petitioners' conviction under an unconstitutionally vague law. That vagueness problem can be avoided only by construing § 641 (as was done in *Lambert*) as not applying to the receipt of unclassified government information whose release is not explicitly prohibited by a formal regulation or by some other federal law.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully submits that the petition should be granted.

Respectfully submitted,

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